No. 11773

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

SOUTHERN PACIFIC COMPANY, a corporation,

Appellant,

vs.

WILLIAM K. CARSON,

Appellee.

APPELLANT'S OPENING BRIEF.

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Statement of Jurisdiction.

This is an appeal from a judgment of the United States District Court, Southern District of California, Central Division, entered on a verdict of a jury in an action founded upon the Federal Employers' Liability Act (United States Code Title 45, Section 51, *et seq.*). Jurisdiction of the District Court rested upon United States Code Title 45, Section 56, and the jurisdiction of this Court upon appeal is conferred by United States Code Title 28, Section 225 (a).

Statement of the Case.

This action was brought under the provisions of the Federal Employers' Liability Act, United States Code Title 45, Section 51, *et seq.* The plaintiff William K. Carson was employed by the defendant as a switchman in its yards in the City of Tucson, State of Arizona.

On February 2, 1947, at or about the hour of 10:30 in the morning the plaintiff was setting or "tying down" a hand brake on a tank car by inserting his brake club between the spokes of the wheel. When the plaintiff exerted force on the club it broke in two causing plaintiff to strike his back against the tank car.

The complaint charged that it was the duty of the defendant to exercise ordinary care to provide the plantiff with reasonably safe equipment with which to work, and that the defendant negligently and carelessly furnished the plaintiff with a defective brake club in that the same was caused to be weak and not strong enough to stand up under ordinary work done by the plaintiff. [Tr. p. 3.] The defendant, by its answer, admitted that it was its duty to furnish the plaintiff with reasonably safe equipment with which to perform his work, but denied that it had carelessly or negligently furnished the plaintiff with a defective brake club, and further denied that by reason of any act or acts, faulty omission or omissions on the part of the defendant, its agents, servants or employees, that plaintiff was injured or damaged. [Tr. p. 7.]

A second and distinct answer and defense alleged that the plaintiff was guilty of negligence and that his negligence contributed to the accident.

A third and distinct answer and defense alleged that the plaintiff assumed the hazards incident to his employment and that the injuries or damages, if any, sustained by plaintiff arose solely from the hazards which were ordinarily incident to the performance of his duties, and not the result of any negligence on the part of the defendant, or its employees.

A fourth and distinct answer and defense alleged that it furnished the plaintiff, for use in the performance of

his duties, a hardwood brake club of standard make and design, of a type in general use for the purpose intended, and manufactured by a reputable firm, and that there was nothing about said club to indicate that it was in any way defective, and that the defects, if any, in said club were latent and unknown to the defendant and could not have been discovered by the defendant by the use of ordinary care.

The jury returned a verdict for the plaintiff in the sum of $8,500.00, upon which judgment was entered together with the sum of $76.40 costs, making a total of $8,576.40. Motion for a new trial was presented in due time and denied by the Court. [Tr. p. 33.]

The Evidence.

The evidence in this case is not voluminous. For the convenience of the Court we will here quote that portion which we believe to be essential to the determination of the issues involved.

The plaintiff, testified on direct examination that he was employed by the Southern Pacific Company as a yardman on February 2, 1947, and switching a cut of cars. [Tr. p. 41.] That it was his duty to wind up or set the brake on the car he was riding; that the car was equipped with a staff brake. [Tr. p. 42.]

> "Q. On this particular car, what type of a brake was it? A. Staff brake.
>
> Q. Is that what is called a hand brake? A. That is a hand brake but you are required to use a club.
>
> Q. It is a hand brake but you have to use a club? A. Yes, sir.

Q. Now did you have a club with you that you were tying this car down with? A. Yes, sir.

Q. Where had you gotten that club? (10) A. From the front of the yard office. They have a can in front of the yard office and I got it out of there.

Q. When had you gotten the club? A. I got it that morning, 7:59, before I went to work.

Q. Is that something that is necessary to have with you? A. Yes, sir.

Q. Why? A. That is a hill yard and you need a club to tie the brakes down." [Tr. pp. 42 and 43.]

* * * * * * * *

"Q. In your past experience, state whether or not it was necessary to use a brake club to hold the cars.

Mr. Collins: Just a moment. I would like to ask a question on *voir dire.*

The Court: You may do so.

Voir Dire Examination

By Mr. Collins:

Q. That was on different cars, not this particular car? A. What is that?

The Court: He asked you what experience you have had in the past. Was it on different cars than this one that you (13) had that day?

The Witness: Yes, That is the first time I drove that car.

Mr. Collins: Objected to as incompetent, irrelevant and immaterial.

The Court: Did the cars you used on previous occasions, were they larger cars than the one on this occasion?

The Witness: Yes, sir.

The Court: Overruled.

Direct Examination (Continued)

Mr. Brobst: Will you read the question, Mr. Reporter?

(The question referred to was read by the reporter as follows):

('Q. In your past experience, state whether or not it was necessary to use a brake club to hold the cars.')

The Witness: On some cars where they have a staff brake we have to use a brake club to hold the cars on the track." [Tr. pp. 44 and 45.]

* * * * * * * *

"Q. Now as you attempted to tie down this car at this particular time, just tell what happened. A. I was tying the brake down and the brake club broke and threw me against the end of the tank.

Q. Where did you say you got the brake club? A. From the front of the yard office, the brake club can.

Q. Just describe the brake club if you will, please. A. It is a piece of wood made out of hickory, about 32 inches long, and it is round at one end and it is tapered down at the other end." [Tr. p. 47.]

The brake club was thereupon received in evidence as Plaintiff's Exhibit No. 1. [Tr. p. 48.]

On cross examination the following facts were listed from Mr. Carson:

"Q. Every yardman is furnished with a brake club? A. Yes, sir.

Q. Do you know whether or not brakemen on the road trains, the main lines, are furnished with brake clubs? A. Yes, sir.

Q. In other words, that is the equipment which is furnished every yardman and every brakeman when he gets to work in that capacity? (27) A. Yes, sir.

Q. Now on the morning when you picked up this club—withdraw that.

These brake clubs then are handed out from time to time as the yardmen ask for them, is that correct? A. Well, yes, sir.

Q. In other words, when you go to work there is a big tub or barrel or something in which there are a number of brake clubs? A. Yes, sir.

Q. And you select a brake club from the number that may be there, is that correct? A. Yes, sir.

Q. And in the event a brake club is in there which in your opinion has been used a sufficient length of time you have a right to take another one, do you not? A. Yes, sir.

Q. And any brake club that appears to you to be defective, you can take it or you can reject it? A. Yes, sir.

Q. And they will give you a new brake club? A. Yes, sir.

Q. Is that correct? A. Yes, sir.

Q. About what is the life of a brake club, do you know, (28) approximately? How long are they used? A. I don't know.

Q. You use them then as long as in your opinion the brake club is usable and good for the purpose for which it is supplied to you, is that correct? A. Yes, sir.

Q. These black marks that we see on the outside and the grooves, that is where you put it into the brake wheel and the dirt rubs on the brake club, is that correct? A. Yes, sir.

Q. That in no way affects the usefulness of the club or its durability? A. No, sir.

Q. So on the morning when you selected this brake club you saw one which appeared to you to be practically new? A. Yes, sir.

Q. And you examined it to see whether or not it was usable, is that correct? A. I looked at it to see if there was any splits in it.

Q. Did you or did you not examine it to see whether or not the brake club appeared to be safe to use? A. Yes, sir.

Q. When you examined the club you found no flaws or defects which were visible, did you? A. No, sir. (29)

Q. It looked like a practically brand-new brake club, in perfect condition, didn't it? A. Yes, sir.

Q. No examination so far as your eyes were concerned revealed to you, nor with the exception of the brake *(sic)* which appears now—speaking about this crack—that there was any defect whatsoever in the manufacture or construction of the club? A. Not that I could see.

Q. Then you took the club and went to work and used it that morning, or was it in the evening? A. It was morning.

Q. How long did you see it before the accident happened? In other words, approximately how many hours? A. We had been working pretty steady.

Q. About how many hours? A. About two hours.

Q. You would say that you had tied down—when we say "tied down," so that the jury will understand, we mean setting the brakes. A. Yes, sir.

Q. There is only one brake on one end of the car? A. Yes, sir.

Q. And that is called the B end of the car, is that correct? (30) A. Yes, sir.

Q. And each time that you set the brake this club gave no indication whatsoever to you that it was going to break, did it? A. No, sir.

Q. Now how many would you say you had tied down since you took this club in the morning, probably 15 or 20 cars? A. I tied down more than that.

Q. About how many would you say in the time that you were working that morning—that is February 3rd, was it not? A. February 2nd.

Q. That you tied down before this occurrence took place? A. (Pause.)

Q. Just your estimate, please, Mr. Carson. A. About 30 or 35 cars.

Q. You would say then, would you not, when you got this club that there were few marks on it, if at all, and these 30 or 35 cars you tied down did not of that marking on this club, isn't that correct? A. Yes, sir.

Q. And during the time that you were tying down the 30 or 35 cars there was no indication, such as a springing in the club or a cracking of the club, to indicate that there was anything wrong? (31) A. No cracking but it felt a little springy.

Q. What? A. It felt a little springy.

Q. There is a spring, of course, in every club as you use it? A. Yes, sir.

Q. In other words, it was just the normal club that you picked up from time to time and used in tying down cars other than the fact that it did break at the time that you fell? A. Yes, sir. [Tr. pp. 55-59 inclusive.]

* * * * * * * *

"Q. And it was your duty to ride this cut to a standstill and set up the brakes, is that correct? A. Yes, sir.

Q. Then when this cut of cars—was it two or three? A. It was three cars. (33)

Q. That is, a boxcar and two tankers? A. Yes, sir.

Q. When the engineer made the cut, or I should say stopped it and let these cars, roll, would you say they were rolling some four or five miles an hour? A. Yes, sir.

Q. This cut of three cars was then going to go to a joint. to some other cars on the same track which were spotted? A. Yes, sir.

Q. During the process of making up a train to go out on the road? A. Yes, sir.

Q. Is that correct? A. Yes, sir." [Tr. p. 60.]

* * * * * * * *

"Q. Then the cut was made when the car which was going to a joint on making up the train was somewhere around 210 feet or 200 feet? A. Yes, sir.

Q. And moving about five miles per hour? A. Yes, sir.

Q. You started to set up the brakes, is that right? A. I started to set up the brakes when I got clear of the track.

Q. When you got clear of what? A. When it was clear of the main line.

Q. You mean after you cleared the switch point? A. Yes, sir.

Q. And you were standing there and you used your hands to take up the slack, is that correct? A. Yes, sir.

Q. Now so that the jury will understand what we mean by taking up the slack, down at the base of your staff there is a chain which fastens to a pin, is that correct? A. Yes, sir.

Q. And when you set up your brakes you take up the slack by winding up the loose chain? (35) A. Yes, sir.

Q. There is a certain amount of loose chain on every brake which has to be there for a normal brake is that correct? A. Yes, sir.

Q. After you have taken up the slack, in other words, taken up all chain, and wrapped it around your staff then you use your club to set it up tightly, is that correct? A. Yes, sir.

Q. That is a normal, everyday operation indulged in every day by you yardmen, is that correct? A. Yes, sir.

Q. Then when you put your club into the wheel, the spokes in there, you stick this club in between the spokes, is that correct? A. Yes, sir.

Q. And you gave one pull, is that correct, or had you taken several pulls with the brake? A. No, I took one pull.

Q. You took one pull? A. Yes.

Q. Did you find the slack pretty well set up at the time you started to pull it? A. Yes, sir.

Q. In other words, the brake slack on that car was (36) just about the normal range of slack that you should find in cars which are in good condition, isn't that right, because you only had to give it one pull? A. Yes, sir.

Q. The ratchet on that brake was in good shape? A. Yes, sir.

Q. The dog was in good shape? A. Yes, sir.

Q. There wasn't anything the matter with the brake at all? A. No, sir.

Q. It was a perfectly normal operating brake without any defects whatsoever, wasn't it? A. Yes, sir.

Q. You say there were not any defects? A. No.

Q. The sole complaint you have in connection with this accident is that a brake club which you yourself inspected before going to work, for some unknown reason broke, is that right. A. Yes, sir.

Q. Of course in setting up a brake you don't measure the exertion or the effort that you put into the pull on a brake club, you give it whatever you think is necessary for the purpose of stopping this car within the distance in which (37) you have so that you will make a normal, easy joint or coupling, as we sometimes call it? A. Yes, sir.

Q. And whatever that, in your opinion, is necessary, whatever effort is necessary to exert, that is the effort that you use, is that right? A. Yes, sir." [Tr. pp. 61-63, inclusive.]

Daniel J. Byrne, Jr., a witness called by the plaintiff, testified on direct examination that he was a switchman employed in the same crew with the plaintiff; that he did not witness the accident, but went over afterwards; that brake clubs were used by the Southern Pacific Company for use in setting brakes. [Tr. pp. 71 and 72.]

He described the operation of setting the brakes as follows:

"Redirect Examination

By Mr. Brobst:

Q. Maybe we can describe it a little better. There is a staff like this (illustrating) on the car, like I have this (50) pencil, is that correct? A. Yes, sir.

Q. Then on top of the staff there is a wheel? A. That is right.

Q. And the wheel has spokes in it? A. Yes, sir.

Q. When you wind on the wheel on top of the shaft that brings up a chain that tightens up the brake shoes on the car? A. That is correct.

Q. And to get leverage you insert the club in the spokes of the wheel and then you can pull around that way and get more leverage, is that correct? A. That is right.

Q. Or you shove on it, whichever way you do, is that correct? A. That is right.

Q. And that is what is known as the Ajax hand brake. A. Well, it is known as a staff hand brake." [Tr. p. 73.]

VALNEY BARNETT, witness produced by the plaintiff, testified on direct examination that he was employed as a switchman by the Southern Pacific Company, and was foreman of plaintiff's crew; that he saw Mr. Carson fall against the end of the car; that he did not know what happened. [Tr. pp. 75 and 76.] He further testified:

"Q. About how fast was the cut of cars moving that Mr. Carson was on at the time that he lunged against the end of it? A. Well, they were practically to a stop.

Q. Now what type of brake was on this—you went over to the oil car, did you, or the tank car? A. That is true.

Q. What type of brake did it have on it? (53) A. Staff brake.

Q. Is that a hand operated brake? A. Well, they are commonly called hand brakes.

Q. Can you set them properly by hand? A. Not in the Tucson yard.

Q. What are you required to use to set them? A. A club." [Tr. p. 75.]

WILSON D. JACOBS, witness for the plaintiff, testified on direct examination that he had been employed as a yardman by the Southern Pacific Company from 1921 to 1936. [Tr. p. 77.]

"Q. Have you used brake clubs? A. Oh, yes. I have rolled cars in the Los Angeles yard for the Southern Pacific for approximately 10 years out of my service here.

Q. During all of that time have you had occasion to use brake clubs? A. Most of the time; yes, sir.

Q. Now I will show you this brake club—

Mr. Collins: May I ask a question, counsel?

Mr. Brobst: Yes, sir. (57)

Mr. Collins: Your last service as a yardman was when?

The Witness: My last service working in the yard was November 1939, as I remember it.

Mr. Collins: Almost eight years ago?

The Witness: Yes, but I have been representing the yardmen on the Los Angeles Division since 1936, and I go into the yard daily.

By Mr. Brobst:

Q. Now, Mr. Jacobs, do you recognize this as being a type of brake club that is used by the Southern Pacific? A. Yes, sir.

Q. Would you just state, is that brake club that you have there a normal brake club?

Mr. Collins: That is objected to on the ground there is no foundation laid as to what is a normal brake club, whether he knows what the specifications are for a normal brake club.

The Court: Sustained.

By Mr. Brobst:

Q. Is that the type of brake club that was in use while you were working for the Southern Pacific Company? A. Yes, sir. This type of club has been used on the Los Angeles Division of the Southern Pacific for a good many years. I couldn't say exactly how long, but approximately 15 or 18 years. Before that they had a little different type that this. (58)

Q. And you are thoroughly familiar with that type of club? A. Yes, sir. I have rode many a cab with this type of a club.

Q. And the clubs that you used were supplied to you by the Southern Pacific Company? A. That is right.

Q. I will ask you now, in your opinion, is that a good strong club sufficient to be used in breaking cars? A. No, sir.

Q. Why not?" [Tr. pp. 78 and 79.]

Mr. Jacobs testified on *Voir Dire* Examination:

"By Mr. Collins:

Q. What experience have you had in the manufacture of brake clubs? A. I never had any.

Q. What experience have you had in the tensile strength of wood? A. I have represented—

Q. No, I didn't ask you who you represented, I asked you a simple question.

The Court: Let him complete his answer.

The Witness: I have represented a great many yardmen that have been involved in accidents on account of cars not being controlled that were under their charge and the specifications of brake clubs have been explained a great many times by the officers of the Southern Pacific Company that purchase them and supply them to the yardmen. That is what gives me the information that I have, on account of the information that I have heard the officers state at investigations.

Q. When you say "officers" you mean trainmasters and roadmasters? A. And men in the car department and also in the store department.

Q. So far as you are concerned personally, you have conducted no tests, is that right? (60) A. Only in applying brakes.

Q. I am speaking now about testing woods. A. I have assisted in testing brakes where there was an argument as to it.

Q. Would you please answer my question?

The Court: Let him complete his answer. You cut him off too quickly. Go ahead.

The Witness: Let me have the question.

(The question referred to was read by the reporter as follows:

('Q. So far as you are concerned personally, you have conducted no tests, is that right? A. Only in applying brakes.

('Q. I am speaking now about testing woods.')

The Witness: Well, I have assisted in making tests on brakes with brake clubs where brake clubs were used and where there had been an accident in connection with investigation that was being conducted.

M. Collins: I move that the answer be stricken as not responsive. I asked him what experience he had had in testing the tensile quality of woods.

Mr. Brobst: I will oppose the objection, your Honor.

The Court: He confines his questions to woods. That is what he is objecting to. This witness hasn't testified as to what kind of woods he has had experience with. (61)

Mr. Brobst: This witness refers to his testing of brake clubs when they have broken and accidents have arisen. I think that is proper.

The Court: Overruled. Go ahead.

By Mr. Collins:

Q. Do you know what the tensile strength of oak is? A. No, I don't.

Q. Do you know whether or not in the selection of wood for a brake club what examination or what is to be taken into consideration with reference as to how fast it grew or how slow it grew? A. All I know is what I have heard the officers say.

Q. I am speaking now, Mr. Witness, from your own experience. A. I never raised any timber.

Q. You don't know anything about how many rings are required or whether any are required or what the growth is? A. Yes. The growth is supposed to be second growth hickory.

Q. I am speaking about whether it should be fast or slow. A. I don't know whether they grow it fast or slow.

Q. Do you know second growth hickory when you see it? A. I am told these brake clubs are supposed to be second growth hickory. (62)

Q. I asked you, can you pick up a piece of wood and tell whether it is first or second growth? A. I am not a wood specialist, only brake clubs.

Mr. Collins: I object on the ground it is calling for a conclusion of the witness, no proper foundation laid whether there is proper wood in that club or not.

The Court: Overruled.

By Mr. Brobst:

Q. Now, by picking that club up, can you tell whether or not it is strong enough to use in the ordinary braking operations?

Mr. Collins: That is objected to on the ground it is incompetent, irrelevant and immaterial, calling for a conclusion of the witness.

The Court: Overruled.

The Witness: Well, this club is too light to be of a good grade of wood that will sustain the strain that is put on a brake club when it is applied with any degree of force." [Tr. pp. 80-83, inclusive.]

Mr. Jacobs testified on cross examination:

"By Mr. Collins:

Q. What is the weight of that club? A. Well, I couldn't say. I could only estimate. It would be only two and a half pounds, something like that.

Q. What is the weight of a club that you have in mind? A. Well, it would be approximately half a pound or so heavier than that.

Q. What is the specified weight, do you know? A. No, I don't.

Q. You don't know whether it is 18 pounds, 19 pounds or 36 pounds? A. No, I don't. I don't think there is any specified weight, according to the specifications. If they have any, I have never seen it.

Q. In other words, you are just picking up a club and feeling it in your hand and saying it doesn't feel heavy enough to me? A. I say because I have seen brakes like that being (64) broken before and breaking them myself before.

Q. You just simply picked it up and after holding it in your hand you say you don't think it is quite heavy enough? A. That is right. I don't think it is heavy enough.

Q. And you say that you also base your opinion on the fact that you have seen other clubs that are broken? A. Many of them; yes, sir.

Q. And you have seen all sizes broken? A. I have.

Q. Lightweight, heavyweight, middleweight? Isn't that true? A. Yes.

Mr. Brobst: Let the witness answer. You cut him off all the time.

The Witness: I would like to have the question reread.

(The record referred to was read by the reporter as follows):

('Q. And you have seen all sizes broken? A. I have.

('Q. Lightweight, heavyweight, middleweight? Isn't that true?')

The Witness: I have seen all kinds of clubs broken, and some of them are broken on account of being worn, some of them are broken on account of being inferior quality wood that were not worn, and those that were worn that break, if they are a good club and have been used any length of time the *brake* will be stringy. The break runs through, it will be splintered out, while this is broken in two.

By Mr. Collins:

Q. You don't see any defects in the club, do you? A. Only the weight.

Q. I asked you about the visible defects. A. There is no visible defects, but if I would pick that club up, if I was going to ride a car, I would use it with a great deal of care.

Q. Just one more question: You said that the weight in the club indicated to you that quality of the wood, didn't you? A. It indicates to me the strength of the wood.

Q. Just wherein does the weight indicate quality? A. Well, I am not a wood specialist and I can't answer it except only in this way, that I know from my experience if I get a good heavy club I never have any trouble with it breaking, but a light club that is the same size in dimensions as the heavy club is and it breaks, why that is the only thing that I can say." [Tr. pp. 83-86, inclusive.]

Valney Barnett, recalled as witness on behalf of the plaintiff, testified on direct examination that he did not, at any time, observe any test being made by any of the supply men at any time while he was working in the Tucson yards. [Tr. p. 113.]

Robert Adam Graham, witness called on behalf of the defendant, testified on direct examination that he was Assistant Chief Chemist of the Southern Pacific Company, [Tr. p. 114], and that the brake clubs were purchased from Turner, Day & Woolworth Handle Company,

a division of the American Cork and Pulp Company. [Tr. p. 127.]

"Q. Now will you tell the jury, or state to the jury if you will, please, how the inspection is made, what procedure is used? A. We get notice from our store department that a new shipment has been received. It is a special form that is submitted to us. We go over to the storehouse and pick at random 20 per cent of the shipment of the brake clubs, either in crates or sacks.

Mr. Brobst: I will object to the testimony, your Honor, (122) in view of the fact that he states that 20 per cent are inspected; unless his inspection is limited to the club in evidence it would become immaterial.

The Court: I think that that has some relevancy as to just what the company does in using ordinary care. Overruled.

By Mr. Collins:

Q. Do you take each shipment as it comes in, is that correct? A. That is correct.

Q. And before any of the clubs are shipped out, in so far as any particular shipment is concerned, do you stamp that shipment as having been inspected by you? A. We have to.

Q. I want you to go into detail as to the method of inspection, the tests that you make—just a moment before we ask that question.

Do you make an inspection of each club in the shipment? A. No, sir. That is impossible.

Q. Now state to the jury in detail the inspection that you make, whether it is one of two kinds, whatever you may do. A. After visible inspection of the shipment is taken at random, six clubs out of each shipment are brought into the testing laboratory.

Q. How many in a shipment? A. It depends on what the order is, according to their (123) consumption.

Q. You take a percentage? A. Yes, sir. There is one correction. I said 20 per cent. It is one out of every 20, which is equal to 5 per cent. That is universal testing practice.

Q. Now state what you do. A. We bring these clubs into the laboratory, check them for their breaking strength, their deflection from the center axis; in other words, we place them in a large machine that fixes the end of the club and the handle end is raised with a traction dynamometer—is similar to a scale—and the force exerted on that club is measured. We measure the actual breaking strength of the club.

We also measure the deflection of the club from the time we start the test to the first evidence of breakage.

When what we found constitutes a good club we hold to that standard.

Q. What pressure do you exert upon a club, or I should say what pressure do you insist a club should stand before it is passed or before any of that shipment is passed? A. At least 500 pounds.

Q. Now in the event you find a defective club from the tests which you make from a shipment, then what if anything do you do? A. We return to the shipment and go through them very (124) carefully because we allow no defects in a brake club.

Q. You mean by that that if you find in the entire shipment just one club you condemn that shipment until further inspection? A. Well, we wouldn't condemn it, we would go through it ourselves, or at

least go through another 5 per cent. If we found a second one we would go through the entire shipment.

Q. Now when you make this test, can you make a test such as you have described on each and every club in the shipment? A. No, sir.

Mr. Brobst: I object to that, your Honor. That is a question for the jury.

Mr. Collins: That is merely preliminary, if your Honor please.

The Court: Overruled. It is preliminary.

By Mr. Collins:

Q. You say you cannot? A. No, sir.

Q. Now will you state to the jury why you cannot make a test on each and every club in the shipment to determine its tensile strength?

Mr. Brobst: I will make the objection to that also, your Honor. That is invading the province of the jury.

The Court: Overruled. (125)

The Witness: Well, if you tested every club—when we test them we destroy them for further use. I think that answers it.

By Mr. Collins:

Q. In other words, when you make a test on a club that club cannot be used? A. It cannot be used.

Q. And if you made a test on each and every club it would destroy the entire shipment? A. That is right.

Q. I take it then that you select at random 5 per cent of the clubs and make a test to determine whether or not they break at less than 500 pounds pressure? A. Yes, sir." [Tr. pp. 130-133, inclusive.]

* * * * * * * *

"Q. I wonder if you will put these pictures in order, commencing at the beginning of the test, so that we may mark them one after another if they are admitted in evidence? A. There are three to a set. (126)

Q. Which are the first three? A. These. They are numbered.

Q. These are just extra sets? A. Yes."

* * * * * * * *

"Q. State whether or not in your experience the procedure which you follow with respect to inspection of shipments of brake clubs in the procedure which is generally followed and considered good practice throughout the railroad industry.

Mr. Brobst: I will object to that, your Honor. That is not the test.

The Court: Sustained.

By Mr. Collins:

Q. I hand you laboratory test No. 424-1. State what that represents. A. That represents a handle as set up to make the original first test. It is a new handle. This is a big Olson test machine that we use to hold the club firmly in blocks there. This is a chain hoist with a traction dynamometer, which is equal to a scale.

Q. This is the gauge up at the top? A. This is the gauge, yes. By the pull it registers (127) the pounds.

Mr. Collins: Can we mark "G-1" as the position of the gauge?

Mr. Brobst: Whatever you say is all right.

The Witness: And we have here a steel rule indicating how far the center of the handle is from the

floor. Force is applied by the chain hoist, raising the handle into a position as shown.

By Mr. Collins:

Q. Just a minute. That hoist is then in a position to raise the handle? A. To start the test.

Q. The test has not been commenced? A. No, sir.

Mr. Collins: I offer this in evidence as defendant's exhibit next in order, your Honor.

The Clerk: That will be defendant's Exhibit A.

The Court: Admitted.

(The photograph referred to was received in evidence and marked Defendant's Exhibit A.)

Mr. Collins: May I hand it to the jury, if your Honor please?

The Court: Yes." [Tr. pp. 134 and 135.]

* * * * * * * *

"Q. What is this laboratory test No. 424-2? Will you explain it to the jury in detail? A. It is a close-up view of the point of application of force. It shows the end of the handle, where a bolt is placed through the center so the handle will not slip in making the load application.

Q. What is this ruler off at the end? A. This rule is for measuring the height from the floor. This is more or less to give you an idea how far in from the end of the handle that the load application is made.

Mr. Collins: I offer this as defendant's exhibit next in order.

Mr. Brobst: Why not admit it as one exhibit?

Mr. Collins: I would rather keep them separate.

The Clerk: Defendant's Exhibit B in evidence.

(The document referred to was received in evidence and marked Defendant's Exhibit B.) (129)

By Mr. Collins:

Q. Now laboratory test No. 424-3, will you explain what that picture shows? A. That picture shows the club after load has been applied but before fracture. You will note that it is deflected from the center line of the axis about six inches.

Mr. Collins: I offer this as defendant's exhibit next in order.

The Court: Admitted.

The Clerk: Defendant's Exhibit C in evidence.

(The photograph referred to was received in evidence and marked Defendant's Exhibit C.)

Mr. Collins: I will pass these to the jury.

(The exhibits referred to were passed to the jury.)

By Mr. Collins:

Q. Now, Mr. Graham, will you examine the brake club that is before you?

By the way, that club has not been introduced in evidence, if your Honor please.

Mr. Brobst: Yes, I put it in.

The Clerk: It is Plaintiff's Exhibit 1.

By Mr. Collins:

Q. Will you make an examination of Plaintiff's Exhibit 1? A. Yes, sir. (130)

Q. Have you already examined it? A. I have.

Q. Have you examined it in the laboratory at Sacramento? A. I looked at the fracture.

Q. I will ask you whether or not, outside of putting this club in a machine such as you have demonstrated in Defendant's Exhibits A, B and C, whether or not there was any way to determine whether or not there was any flaw in this club. A. No, sir.

Q. I will ask you whether or not the wood from the outside would pass inspection, or would you have passed it as a good and sufficient club? A. I would.

Q. How can you tell the jury in your opinion what caused this club to break? A. Not knowing how it was applied, from the appearance of the wood itself, rather short in fibre, which an inspection couldn't tell without breaking, there is no surface indication. The short end fibre means it is a little bit weak. In combination with the application it might have caused a failure. I notice here some new gashes and the method of applying it might not have been the proper manner.

Q. But in any event of course you don't know how it was (131) applied? A. No.

Q. There is no way of discovering the defect of this club prior to the time it was broken other than taking the club and putting it in a machine and breaking it in half? A. No, sir.

Mr. Collins: You may cross examine.

Cross Examination

By Mr. Brobst:

Q. How much pressure does the ordinary brakeman exert on a club such as that? A. That is something that has never been determined.

Q. You have never determined that? A. No, sir.

Q. Yet you say that a safe test would be 500 pounds? A. That is what we have taken for granted.

Q. Have you just fixed that standard without knowing how much pressure the ordinary man exerts on one of these during the course of his ordinary work? A. Well, I am not in that department. I wouldn't know unless I actually made tests.

Q. Then you just determine these things are safe by some standard that is given to you? A. So many factors enter into it, your deflection, your braking load. Of all the tests made the average is 800 pounds per club. It varies according to the clubs.

Q. You said 500. *Q.* 500 is the minimum. Anything below 500 we wouldn't accept.

Q. But you fix that standard without knowing what the requirements are of the men in the field, how much pressure they exert when they have to fasten up one of these brakes? A. That is not known.

Q. So then actually you don't know whether it is safe or not out in the field because you don't know whether or not they exert more than 500 pounds when they have to tighten up one of these brakes on freightcars on a grade? A. The only thing we can go by is the past record to get the best handle we can.

Q. After a brake club has been used and put back you don't then give it a second test, do you? A. No, sir.

Q. What use it has been subjected to you have no way of determining? A. No.

Q. Then the supply man on the job gives it no test? A. I don't know.

Q. So that it is used, or rather it is put back in a can and no matter what its condition is it is put back for the other men to use? (133) A. That is out of my department.

Q. You don't know anything about that? A. Not the road use.

Q. As far as any test is concerned at the actual scene where the club is used and reused, you know nothing about those tests? A. That is right.

Q. And these clubs are sent out as being safe when you take one out of 20 and if it passes inspection the other 19 go out to be used? A. That is universally accepted with all inspection.

Q. Whether or not they are going to exert more than 500 pounds on each club, you don't know that? A. No, sir." [Tr. pp. 136-140, inclusive.]

Leslie Arthur Estes, called as a witness on behalf of the defendant, testified as follows:

"Direct Examination

By Mr. Collins:

Q. Mr. Estes, your business is what? A. Head buyer.

Q. For whom? A. Southern Pacific Company.

Q. Over what period of time? A. I started in 1913 and for the past 15 years approximately I have been head buyer.

Q. Do you have under your supervision the purchasing of brake clubs? A. Yes, sir.

Q. For what period of time? A. Possibly 15 years.

Q. From whom do you purchase those? A. Throughout that period we have been buying from the Turner, Day & Woolworth Handle Company.

Q. Have you had ocasion to discuss the purchasing of brake clubs from other firms? A. Yes, sir. During that period other concerns have desired and have submitted prices on brake clubs that in some cases have been lower than the brake clubs that we buy from Turner, Day & Woolworth, but we have refrained from considering such purchases due to quality that we have been getting from Turner, Day & Woolworth Handle Company. (135)

Q. In the trade, do you know anything about the reputation of Turner, Day & Woolworth Handle Company? A. To my knowledge they are considered one of the leading tool handle manufacturers.

Q. When you say tools, are you including brake clubs? A. That answer includes brake clubs; yes, sir.

Q. Now do you know whether or not they are a manufacturing concern of recognized standing? A. Yes, sir.

Q. I will ask you whether or not, in conjunction with the United States Department of Commerce, or with the United States Department of Commerce you carried on an investigation and recommendation as to the kind of wood to use in brake clubs and

other wooden instrumentalities." [Tr. pp. 140 and 141.]

* * * * * * * *

"The Witness: That is a fact." [Tr. p. 142.]

KENNETH W. KNIGHT, called as a witness on behalf of the defendant, testified as follows:

"Direct Examination

By Mr. Collins:

Q. Mr. Knight, what has been your business over the last 10 years? A. I have been connected with wholesale hardware.

Q. Were you a purchasing agent? A. I have been connected with purchasing wholesale hardware for the last five years.

Q. And in connection with that position of yours, did you have occasion to learn from the trade the reliability or the reputation of various manufacturers? A. Yes, sir.

Q. I ask you whether or not you are acquainted with Turner, Day & Woolworth Handle Company, which is now a division of the American Cork and Pulp Company? A. I am.

Q. Over what period of time? A. Directly for two and a half years as assistant to the purchasing agent at the California Hardware, at which 100 per cent of our handles were bought from Turner, Day & Woolworth.

Q. I assume you have also had transactions or correspondence, together with consultation with other manufacturers of hardwood handles, such as brake clubs, axe handles, hoe handles and such? (119) A. Yes.

Q. I will ask you whether or not by reason of your experience in the relationship with the trade whether the Turner, Day & Woolworth Handle Company is a reputable firm? A. Yes, they are.

Q. And can you state whether or not it is a manufacturer of recognized standard among the trade? A. That is right; they are.

Q. And in your opinion will you state whether or not that manufacturer is a company that can be depended upon to produce, I should say send to the trade, reputable, substantial standard products which you purchase from them?

Mr. Brobst: I will object to that question, Your Honor, on the ground it is argumentative. I have no objection to the reputation but whether they can be depended upon is argumentative.

The Court: I think it is argumentative. Sustained.

By Mr. Collins:

Q. What, in your opinion, is the reputation and dependability of the Turner, Day and Woolworth Handle Company? A. They have a reputation of furnishing a first-rate handle of all types." [Tr. pp. 127-129, incl.]

The Basis of Plaintiff's Case.

The plaintiff's case was based solely and entirely on the contention that the defendant was guilty of negligence and had violated the provisions of the Federal Employer's Liability Act, 45 U. S. C. A. 51, *et seq.*, as amended August 11, 1939, which reads as follows:

> "Liability of Common Carriers by Railroad, in Interstate or Foreign Commerce, for Injuries to Employees From Negligence: Definition of Employees.
>
> Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.
>
> Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such

commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter. Apr. 22, 1908, c. 149, §1, 35 Stat. 65; Aug. 11, 1939, c. 685, §1, 53 Stat. 1404."

Specification of Errors.

1. The Court erred in permitting the jury to determine whether the brake club was a part of the hand brake within the meaning of the Safety Appliance Act, under the following Instruction, viz.,

> "If you find from a preponderance of the evidence that the hand brake on the tank car in question would not operate effiiciently without the use of a brake club, and if you find further from a preponderance of the evidence that the brake club in question was a necessary part of the hand brake on the tank car, then and in that event only, you may apply the following instructions which I will give you.
>
> "Where plaintiff's contributory negligence and defendant's violation of a provision of the Safety Appliance Act are concurring proximate causes, the Federal Employers' Liability Act requires plaintiff's contributory negligence, if any, be disregarded."

2. The Court erred in failing and refusing to hold, as a matter of law, that the brake club was not a part of the hand brake within the meaning of the Safety Appliance Act.

3. The Court erred in refusing to grant defendant's motion for a new trial on grounds that the evidence, as a matter of law, was insufficient to support the verdict.

SPECIFICATION OF ERROR NOS. I AND II.

Safety Appliance Act Does Not Apply. It Was Error to Submit That Issue to the Jury.

Specifications of Error numbered 1 and 2, are so related and supported by common decisions, that for the purposes of this argument, they will be grouped and jointly presented. Defendant contends that the brake club was, as a matter of law, not a part of the hand brake within the meaning of the Safety Appliance Act and the orders of the Interstate Commerce Commission; and that the Court erred in failing to so declare, and committed prejudicial error in allowing the jury to determine, as a matter of fact, whether the brake club was a part of the hand brake within the meaning of the Safety Appliance Act.

At the request of the plaintiff and over the objections and exceptions of the defendant, the Court gave two instructions to the jury based upon the Safety Appliance Act, (United States Code, Title 45, Sections 11 and 12).

These instructions (above quoted) are to be found at page 211, Transcript of Record, and are as follows:

> "If you find from a preponderance of the evidence that the hand brake on the tank car in question would not operate efficiently without the use of a brake club, and if you find further from a preponderance of the evidence that the brake club in question was a necessary part of the hand brake on the tank car, then and in that event only, you may apply the following instructions which I will give you.
>
> "Where plaintiff's contributory negligence and defendant's violation of a provision of the Safety Appliance Act are concurring proximate causes, the Federal Employers' Liability Act requires plaintiff's contributory negligence, if any, be disregarded."

By the foregoing instructions the Court in effect attempted to delegate judicial power to the jury, in the exercise of which the jury necessarily was called upon to construe the provisions of the Safety Appliance Act. To put the matter another way, the Court by these two instructions permitted the jury to determine whether the brake club was a part of the hand brake *within the meaning* of the Safety Appliance Act (45 U. S. C. A., Sec. 11). In so doing, the Court disregarded Section 2102 of the Code of Civil Procedure of California, which exclusively vests the construction of statutes in the Court. Section 2102 provides:

> "All questions of law, including the admissibility of testimony, the facts preliminary to such admission *and the construction of statutes and other writings,* and other rules of evidence, *are to be decided by the Court* and all discussions of law addressed to it. * * *" (Emphasis supplied).

The scope of the requirements of the Safety Appliance Act and the orders of the Interstate Commerce Commission, were under the undisputed evidence, solely a question of law for the Court to determine and not an issue of fact for the jury. The inevitable result of this surrender of duty was to by-pass and do violence to such pertinent decisions as *Baltimore & O. R. Co. v. Hooven* (C. C. A. 6), 297 Fed. 919; *New York C. & St. L. R. Co. v. Kelley* (C. C. A. 7), 70 F. (2d) 548; *Sherry v. Baltimore & O. R. Co.* (C. C. A. 6), 30 F. (2d) 487, certiorari denied 280 U. S. 555, 74 L. Ed. 611; *Kaminski v. Chicago M. St. P. & P. R. Co.* (Minn.), 231 N. W. 189, certiorari denied 282 U. S. 872, 75 L. Ed. 770; and *Harlan v. Wabash Ry. Co.* (Mo.), 73 S. W. (2d) 749,—wherein it was

expressly held, *as a matter of law,* that a locomotive or car reaching an established place of repair and undergoing repairs at that point, is not *"in use"* on the carriers line, nor is it at that time and place engaged in the active service of the carrier within the meaning of the Boiler Inspection Act (45 U. S. C. A. Section 23.) See also *Noftz v. Baltimore & O. R. Co.* (C. C. A. 6), 13 F. (2d) 389.

In *Compton v. Southern Pacific Co.*, 70 Cal. App. (2d) 267, 161 P. (2d) 40, the California Court held that it was reversible error for the trial court to submit to the jury, as an issue of fact, the question of whether a locomotive undergoing repairs in a roundhouse was *in "use" on the "carrier's line"* within the provisions of the Boiler Inspection Act. In reversing the case, the District Court of Appeal expressly held that the construction of the statute and the issue of its violation were essentially and exclusively questions of law to be determined by the Court, and could in no sense be regarded as issues of fact for a jury to determine. The law is well settled in California that the question of whether a statute is applicable to the facts upon which a recovery is sought is in all instances a matter of law for the Court to determine. *Campbell v. City of Santa Monica,* 51 Cal. App. (2d) 626, 629, 125 P. (2d) 561; *Clarke v. Foster's Inc.,* 51 Cal. App. (2d) 411, 414. 125 P. (2d) 60; *Bodinson Mfg. Co. v. California E. Com.,* 17 Cal. (2d) 321, 326, 109 P. (2d) 935; *Whittman v. Steiger,* 46 Cal. 256; *Holtman v. Butterfield,* 51 Cal. App. 89, 92, 196 Pac. 85; *People v. Kaufman,* 49 Cal. App. 570, 572, 193 Pac. 573.

The provisions of the Safety Appliance Act are mandatory and penal in nature. Sections 11 and 12 of the Safety Appliance Act (45 U. S. C. A., Sections 11 and 12), provide as follows:

"§ 11. Safety appliances required for each car; when hand brakes may be omitted

"It shall be unlawful for any common carrier subject to the provisions of sections 1-16 of this title to haul, or permit to be hauled or used on its line, any car subject to the provisions of said sections not equipped with appliances provided for in sections 11-16 of this title, to wit: All cars must be equipped with secure sill steps and efficient hand brakes; all cars requiring secure ladders and secure running boards shall be equipped with such ladders and running boards, and all cars having ladders shall also be equipped with secure handholds or grab irons on their roofs at the tops of such ladders: *Provided,* That in the loading and hauling of long commodities, requiring more than one car, the hand brakes may be omitted on all save one of the cars while they are thus combined for such purpose. Apr. 14, 1910, c. 160, § 2, 36 Stat, 298.* * *"

"§ 12. Safety appliances, as designated by commission, to be standards of equipment; modification of standard height of drawbars

"The number, dimensions, location, and manner of application of the appliances provided for by sections 4 and 11 of this title as designated by the Interstate Commerce Commission shall remain as the standards of equipment to be used on all cars subject to the provisions of sections 1-16 of this title, unless changed by an order of said Interstate Commerce Commission, to be made after full hearing and for good cause shown; and failure to comply with any

such requirement of the Interstate Commerce Commission shall be subject to a like penalty as failure to comply with any requirement of sections 11-16 of this title. Said commission is hereby given authority, after hearing, to modify or change, and to prescribe the standard height of drawbars and to fix the time within which such modification or change shall become effective and obligatory, and prior to the time so fixed it shall be unlawful to use any car or vehicle in interstate or foreign traffic which does not comply with the standard so prescribed by the commission. Apr. 14, 1910, c. 160, § 3, 36 Stat. 298. * * *"

To justify a recovery of damages under the Safety Appliance Act, the plaintiff who claims the benefit of that statute must affirmatively show a violation or breach thereof by the carrier. The provisions of the Safety Appliance Act, which we have just quoted, do not by their terms encompass a brake club, and the record is devoid of evidence that the defendant failed to comply with any of the standards imposed by the Safety Appliance Act or ordered by the Interstate Commerce Commission, with respect to the maintenance and construction of the hand brake. There was, therefore, a complete failure of proof upon the part of the plaintiff in respect to showing a violation of the Safety Appliance Act or a violation of any order of the Interstate Commerce Commission. In the absence of a showing that defendant violated the provisions of the Safety Appliance Act, or violated an order of the Interstate Commerce Commission, defendant is entitled to the presumption that its hand brake fully and completely complied with the law and the orders of the Interstate Commerce Commission concerning hand

brakes. A copy of the regulations of the Interstate Commerce Commission in this respect, is attached hereto and will be found in the appendix.

On September 29th and 30th, and October 7th, 1910, and on February 27th, 1911, hearings were held before the Interstate Commerce Commission at its offices in Washington, D. C., to consider the matter of the number, dimensions, location and manner of application of the appliances in accordance with the provisions of Section 3 of the above named act of Congress; and on March 13, 1911 the Interstate Commerce Commission made its order designating the number, dimensions, location and manner of application of various safety appliances among which was that of hand brakes; this order, so far as it relates to the particular safety appliance involved in this case, has never been amended and is now in full force and effect. Vol. 2, *Roberts Federal Liabilities of Carriers,* pages 2010-2013, inclusive: The order of the commission with respect to hand brakes are set forth on pages 1 to 3 in the appendix to this Brief.

The mandate of the Safety Appliance Act embraces only specific appliances and is limited to certain designated requirements in respect to such appliances. *Roberts Federal Liabilities of Carriers,* Section 562.

In the case of *Cincinnati, N. O. & T. P. R. Co. v. Rankin,* 241 U. S. 318, 326, 328, 60 L. Ed. 1022, 1026, it is said:

> "It cannot be assumed, merely because the contrary has not been established by proof, that an interstate carrier is conducting its affairs in violation of law. Such a carrier must comply with strict requirements of the Federal statutes or become sub-

> ject to heavy penalties, and, in respect to transactions in the ordinary course of business, it is entitled to the presumption of right conduct. The law 'presumes that every man, in his private and official character, does his duty, until the contrary is proved, it will presume that all things are rightly done, unless the circumstances of the case overturn this presumption, according to the maxim, *omnia presumuntur rite et solemniter esse acta, donec probetur in contrarium.*'"

Nowhere in the Act or the orders of the Commission is there any provision designating the dimensions or weight or other factors of a brake club, or making a brake club a part of the hand brake, or subject to the standards set up for the construction and maintenance of hand brakes. No penalty is imposed upon the carrier irrespective of the kind, shape or dimensions used by the carrier with respect to the brake club. Brake clubs are used by the employees of the company for various purposes such as assisting the user to set up a brake [Tr. p. 42], knocking the dog off of the brake staff, and for a hammer. [Tr. pp. 113 and 114]. The brake club is a contrivance separate and distinct, and designed and used for purposes separately and apart from the brake appliance, and it does not constitute any part of the brake mechanism covered by the Act or the orders of the Interstate Commerce Commission.

The case of *Scarlett v. Atchison, Topeka & Santa Fe Railway Company* was brought in the Superior Court of the State of California, in and for the County of Los Angeles, under the provisions of the Safety Appliance Act and resulted in a verdict in favor of the plaintiff and against the railroad company in the sum of $18,000.00. Mr. Scarlett was injured while descending from a box

car by means of a ladder attached to the side of the car. His foot slipped on a round brace rod also attached to the car immediately behind the ladder, causing him to fall to the ground. The ladder itself was not defective. The ladder complied with the regulations of the Interstate Commerce Commission made in pursuance of the Act "United States Safety Appliance Standards" order of March 13, 1911. The Supreme Court of California, 7 Cal. (2d) 181, 60 P. (2d) 462, affirmed the judgment in favor of the plaintiff applying the Safety Appliance Act to the facts of the case.

The Supreme Court of the United States reviewed the case of *Atchison, Tokepa & Santa Fe Railway Company v. William W. Scarlett,* 300 U. S. 471, 81 L. Ed. 749, and held in effect that the Safety Appliance Act applied *only* to those appliances coming within the Act and covered by orders of the Interstate Commerce Commission in pursuance to the authority invested in that body by the Safety Appliance Act. In this respect the Court said:

> "* * * we may fairly presume that the Interstate Commerce Commission in the performance of its duties was aware of the situation, and knowingly permitted its rule in respect of the ladder clearance to remain without change. Compare Pennell v. Philadelphia & R. R. Co. 231 U. S. 675, 680, 58 L. ed. 430, 434, 34 S. Ct. 220. The regulation having been made by the commission in pusuance of constitutional statutory authority, it has the same force as though prescribed in terms by the statute. And the railway company having strictly complied with the regulation has discharged its full duty so far as the ladder requirement of the Safety Appliance Act is concerned. The judgment of the trial court and jury cannot be

substituted for that of the commission. See Kansas City S. R. Co. v. United States, 231 U. S. 423, 456, 457, 58 L. ed. 296, 309, 310, 34 S. Ct. 125, 52 L. R. A. (N. S.) 1; Napier v. Atlantic Coast Line R. Co., 272 U. S. 605, 611, 612, 71 L. ed. 432, 438, 439, 47 S. Ct. 207; Mahutga v. Minneapolis, St. P. & S. Ste. M. R. Co. 182 Minn. 362, 366, 234 N. W. 474; Auschwitz v. Wabash R. Co., 346 Ill. 190, 204, 178 N. E. 403; Ford v. New York, N. H. & H. R. Co. (C. C. A. 2d) 54 F. (2d) 342, 343.

In Illinois C. R. Co. v. Williams, 242 U. S. 462, 466, 61 L. ed. 437, 440, 37 S. Ct. 128, we held that §2 of the act requiring secure ladders, etc., was operative pending action by the Interstate Commerce Commission under §3. In the interim, we said §2 had the effect of prescribing an absolute and imperative duty, of making the ladders and other appliances 'secure;' but that §3 contemplated that these appliances 'shall ultimately conform to a standard to be prescribed by the Interstate Commerce Commission, that is, that they shall be standardized . . .'

We do not see how it reasonably can be said that the brace rod constitutes a part of the ladder. In itself, it was a contrivance separate and distinct from the ladder, designed and used for a purpose entirely apart from the use of that appliance. The right of recovery, if any, must, therefore, rest upon the effect of the near proximity of the ladder to the rod, neither being in itself defective. The law to be applied to that situation is the common-law rule of negligence, and not the inflexible rule of the Safety Appliance Act, and the questions to be answered are whether the two appliances were maintained in such relation to one another as to constitute negligence on the part of the company and, if so, whether Scarlett

assumed the risk. Ford v. New York, N. H. & H. R. Co. (C. C. A. 2d), 54 F. (2d) 342, *supra*; Chicago, R. I. & P. R. Co. v. Benson, 352 Ill. 195, 199, 185 N. E. 244; Slater v. Chicago, St. P. M. & O. R. Co. 146 Minn. 390, 392, 393, 178 N. W. 813. In that view, Scarlett in abandoning his claim under the common-law rule of negligence abandoned the only possible ground of recovery.

Judgment reversed, and cause remanded for further proceedings not inconsistent with this opinion."

In the case of *Ford v. New York, N. H. & H. R. Co.,* 54 F. (2d) 342, the plaintiff alleged a violation of the Safety Appliance and Boiler Inspection Acts (Safety Appliance Act of March 2, 1893, c. 196, § 4, 27 Stat. 531 (45 U. S. C. A. §4); Boiler Inspection Act of February 17, 1911, c. 103, §2, 36 Stat. 913). The Safety Appliance standards for locomotives, fixed by the Interstate Commerce Commission order of March 13, 1911, required steam locomotives used in road service to have side handholds, which, if vertical, must be of clear length equal to the approximate height of the tank, and they are required to be located, if vertical, one on each side of the tender within six inches of the rear. The handholds conformed to the orders of the Interstate Commerce Commission, but there was grease on the handholds which caused the plaintiff to fall and be injured. In affirming a judgment of a dismissal of the complaint and entry of judgment in favor of the defendant, the Court said:

"We think the Safety Appliance and Boiler Inspection Acts have no application under these circumstances. When the carrier complied with the requirement of the Interstate Commerce Commission order by having the handholds and maintained them

in good repair, they were for the purpose of the statute in proper condition and safe for operation. Erie R. R. v. Lindquist, 27 F. (2d) 98 (C. C. A. 3); Lehigh & N. E. Ry. v. Smale, 19 F. (2d) 67 (C. C. A. 3). Having made the tender safe to operate, if later it became unsafe by putting grease on the handhold, even if such was negligently caused, it is not a violation of the statutory obligation of the appellee. The tender was lawfully equipped with proper equipment by way of handholds, which was an absolute duty imposed by statutory law. The act of putting grease thereon later may have been a violation of the relative duty imposed by general law upon the employer. But counsel has insisted upon resting his case solely upon the claim of violation of the statutory law. If during the operation the safety appliance required by the act was rendered temporarily unsafe by reason of the grease placed thereon, this is not a condition which brings it within the purview of the act. Fredericks v. Erie R. R., 36 F. (2d) 716 (C. C. A. 2); B. & O. R. R. v. Hooven, 297 Fed. 919 (C. C. A. 6).

It was not the intent of Congress to make the railway company responsible for grease on the handhold, imposed as an absolute obligation. Congress intended to and quite properly imposed absolute liability upon the railroad company for proper railroad equipment and safety appliances, in the construction and maintenance of locomotives and tenders. The Federal Employers' Liability Act (chapter 149, §1, 35 Stat. 65 (45 U. S. C. A. §51)), make express reference to cars, engines, and appliances, but, in order to recover under this act, it is necessary for a plaintiff to prove negligence. Under the Safety Appliance and Boiler Inspection Acts, it is not neces-

sary to prove negligence, but failure to comply with the requirements of the act implies negligence. Texas & P. Ry. v. Rigsby, 241 U. S. 33, 36 S. Ct. 482, 60 L. Ed. 874. If the appellant's theory were accepted to impose liability, it would also modify the requirements of the Federal Employers' Liability Act (45 U. S. C. A. §§51-59) so as to establish negligence for a plaintiff's recovery thereunder. A railroad company can be required to equip its cars with necessary safety appliances, but it cannot be held responsible for every careless act.

An examination of the debates in Congress on the passage of these acts, shows no intention by Congress to impose civil liability for a condition occurring during the operation of the train which does not affect the construction and maintenance as required by the Safety Appliance Act. 61st Congress, 2d Session, Senate Documents, 446; 52d Congress, vol. 23, Congressional Record, p. 5925; volume 24, pp. 1273-1287; Senate Committee Report, vol. 24, Congressional Record, pp. 1246-1251."

Baltimore & Ohio Railroad Company v. Groeger, 266 U. S. 521, 69 L. Ed. 419, is a case arising out of the death of John C. Groeger, engineer who was killed in a boiler explosion. The action was brought under the Boiler Inspection Act (Safety Appliance Act). The Court submitted for the decision of the jury two issues; the first which we are not here concerned, the second whether defendant's failure to have a fusible plug in the crown sheet violated Section 2 of the Boiler Inspection Act. Verdict went for the plaintiff. The Supreme Court, in passing upon the propriety of the trial court in permitting the

jury to interpret the Boiler Inspection Act, said in considering this question:

> "If the question whether the standard of duty fixed by the act required defendant to have a fusible plug in the crown sheet of the boiler were one for the determination of a jury, we think there was evidence which would sustain a verdict in the affirmative or in the negative. But we think the question was *not* for the jury. Southern P. Co. v. Seley, 152 U. S. 145, 150, 30 L. Ed. 391, 393, 14 Sup. Ct. Rep. 530; Tuttle v. Detroit, G. H. & M. R. Co. 122 U. S. 189, 194, 30 L. ed. 1114, 1116, 7 Sup. Ct. Rep. 1166; Randall v. Baltimore & O. R. Co. 109 U. S. 478, 483, 27 L. ed. 1003, 1005, 3 Sup. Ct. Rep. 322; Kilpatrick v. Choctaw, O. & G. R. Co. 57 C. C. A. 255, 121 Fed. 11; Richards v. Rough, 53 Mich. 212, 216, 18 N. W. 785. And see Southern P. Co. v. Berkshire, 254 U. S. 415, 417, 65 L. ed. 335, 337, 41 Sup. Ct. Rep. 162. The act required a condition which would permit use of the locomotive without unnecessary danger. It left to the carrier the choice of means to be employed to effect that result. While the burden was on the plaintiff to prove a violation of the act by defendant, she was not bound to show that any particular contrivance or invention was suitable or necessary to have and keep the boiler in proper condition. There is a multitude of mechanical questions involved in determining the proper construction, maintenance and use of the boilers, other parts of locomotives, their tenders and appurtenances, all of which are covered by the Boiler Inspection Act, as amended. Inventions are occurring frequently, and there are many devices to accomplish the same purpose. Comparative merits as to safety or utility are most difficult to determine. It is not for the

courts to lay down rules which will operate to restrict the carriers in their choice of mechanical means by which their locomotives, boilers, engine tenders, and appurtenances are to be kept in proper condition. Nor are such matters to be left to the varying and uncertain opinions and verdicts of juries. The interests of the carriers, will best be served by having and keeping their locomotive boilers safe; and it may well be left to their officers and engineers to decide the engineering questions involved in determining whether to use fusible plugs or other means to that end. Tuttle v. Detroit, G. H. & M. R. Co. 122 U. S. 194, 30 L. ed. 1116, 7 Sup. Ct. Rep. 1166; Richards v. Rough, 53 Mich. 216, 18 N. W. 785. The presence or absence of a fusible plug was a matter properly to be taken into consideration in connection with other facts bearing upon the kind and condition of the boiler in determining the essential and ultimate question, *i. e.*, whether the boiler was in the condition required by the act.

But we think the court erred in instructing the jury that defendant was bound to avail itself of 'the best mechanical contrivances and inventions in known practical use which are or would be effective in making safe a locomotive boiler as against explosions;' and also erred in authorizing the jury to decide that 'the standard of duty imposed by the law required a fusible safety plug to be installed,' and that 'the absence of the fusible safety plug would impose upon the defendant here an absolute liability.'

Judgment reversed."

The decisions of the courts support the proposition that when a safety appliance conforms with and is maintained in accordance with the standards fixed by the In-

terstate Commerce Commission it constitutes a full compliance with the law. If the Court was correct in submitting the interpretation of the Safety Appliance Act to the jury, then the requirements of the Act that the Interstate Commerce Commission fix the standards is of no effect whatsoever.

A state is not permitted to establish the standards adopted under the Act, and certainly a jury is not in as good a position to determine such questions as the legislative body of the state.

In *Napier et al. v. Atlantic Coast Line R. Co.,* 272 U. S. 605, 71 L. Ed. 432, the facts are briefly as follows: A statute of the state of Georgia, the execution of which was sought to be enjoined, required that all steam locomotives of a specified type be equipped with an automatic door to the fire-box, of a construction therein described. The question involved was whether, in view of the congressional legislation on the subject, the state of Georgia could enforce its statute. The Supreme Court held that the power to require carriers engaged in interstate commerce, with respect to safety appliances, rested solely with the Interstate Commerce Commission, and in this regard Mr. Justice Brandeis said:

> "The requirements here in question are, in their nature, within the scope of the authority delegated to the commission. An automatic fire door and an effective cab curtain may promote safety. Keeping firemen and engineers in good health, like preventing excessive fatigue through limiting the hours of service, clearly does so, although indirectly; and it may be found that to promote their comfort would likewise promote safety. It is argued that the authority delegated to the commission does not extend to ordering the use or installation of equipment of any kind,

Baltimore & O. R. Co. v. Groeger, 266 U. S. 521, 69 L. ed. 419, 45 Sup. Ct. Rep. 169; and that Congress has definitely reserved that power to itself, Interstate Commerce Commission v. Cincinnati, N. O. & T. P. R. Co., 167 U. S. 479, 42 L. ed. 243, 17 Sup. Ct. Rep. 896; Atlantic Coast Line R. Co. v. Georgia, *supra;* United States v. Pennsylvania R. Co., 242 U. S. 208, 61 L. ed. 251, 37 Sup. Ct. Rep. 95. The question whether the Boiler Inspection Act confers upon the Interstate Commerce Commission power to specify the sort of equipment to be used on locomotives was left open in Vandalia R. Co. v. Public Serv. Commission, 242 U. S. 255, 61 L. ed. 276, P. U. R. 1917B, 1004, 37 Sup. Ct. Rep. 93. We think that power was conferred. *The duty of the commission is not merely to inspect. It is, also, to prescribe the rules and regulations by which fitness for service shall be determined. Unless these rules and regulations are complied with, the engine is not 'in proper condition' for operation. Thus the commission sets the standard. By setting the standard it imposes requirements.* (Italics ours.)

The power to require specific devices was exercised before the Amendment of 1915, and has been extensively exercised since.

'The argument mainly urged by the states in support of the claim that Congress has not occupied the entire field, is that the federal and the state laws are aimed at distinct and different evils; that the federal regulation endeavors solely to prevent accidental injury in the operation of trains, whereas the state regulation endeavors to prevent sickness and disease due to excessive and unnecessary exposure; and that whether Congress has entered a field must be determined by the object sought through the legislation,

rather than the physical elements affected by it. Did Congress intend that here might still be state regulation of locomotives, if the measure was directed primarily to the promotion of health and comfort and affected safety, if at all, only incidentally?

'The federal and the state statutes are directed to the same subject—the equipment of locomotives. They operate upon the same object. It is suggested that the power delegated to the commission has been exerted only in respect to minor changes or additions. But this, if true, is not of legal significance. It is also urged that, even if the commission has power to prescribe an automatic fire box door and a cab curtain, it has not done so; and that it has made no other requirement inconsistent with the state legislation. This, also, if true, is without legal significance. The fact that the commission has not seen fit to exercise its authority to the full extent conferred, has no bearing upon the construction of the act delegating the power. We held that state legislation is precluded, because the Boiler Inspection Act, as we construe it, was intended to occupy the field. The broad scope of the authority conferred upon the commission leads to that conclusion. Because *the standard set by the commission must prevail,* requirements by the statute are precluded, however commendable or however different their purpose. Compare Louisville & N. R. Co. v. State, 16 Ala. App. 199, 76 So. 505; Whish v. Public Serv. Commission, 205 App. Div. 756, 200 N. Y. Supp. 282, 240 N. Y. 677, 148 N. E. 755; Staten Island Rapid Transit Co. v. Public Serv. Commission, 16 F. (2d) 313. (Italics ours.)

'If the protection now afforded by the commission's rules is deemed inadequate, application for relief must be made to it. The commission's power is ample.

> Obviously, the rules to be prescribed for this purpose need not be uniform throughout the United States: or at all seasons; or for all classes of service.' "

It seems abundantly clear that the trial court erred in failing to hold that the brake club was not a part of the hand brake within the meaning of the Safety Appliance Act. It is equally clear that the trial court erred further in instructing the jury upon the Safety Appliance Act and the absolute liability thereunder imposed, and then delegating to the jury the province of construing the Safety Appliance Act to determine whether a brake club was a part of the hand brake within the meaning of that term as applied in the Safety Appliance Act. The giving of the instructions set forth in Specification of Error numbered 1, empowered the jury to determine the applicability of the Safety Appliance Act under evidence which was undisputed. The applicability of the Safety Appliance Act to the undisputed facts was essentially and exclusively a matter of law to be determined by the Court. It was error of the most prejudicial sort for the trial court to submit the case to the jury on the theory that they might find a violation of the Safety Appliance Act with consequent, absolute and full liability upon the part of the defendant. Thereby, the defendant was stripped and deprived of all defenses to plaintiff's cause of action under the Federal Employers' Liability Act, inclusive of the defense of contributory negligence. The error is particularly evident in view of the failure of the plaintiff to establish a violation of the Safety Appliance Act or of the orders of the Interstate Commerce Commission, which he was required to do in order to sustain his burden of proof, and to bring his case within the provisions of the Safety Appliance Act whose benefits he was claiming.

SPECIFICATION OF ERROR NO. III.

The Court Committed Error in Refusing to Grant Defendant's Motion for New Trial on Grounds That the Evidence, as a Matter of Law, Was Insufficient to Support the Verdict.

The evidence is undisputed that the plaintiff purchased the brake clubs from the Turner, Day and Woolworth Handle Company, a division of the American Cork and Pulp Company. [Tr. pp. 127 and 129.] Mr. Kenneth W. Knight testified that he had been connected with the wholesale hardware business for a period of ten years; that for the last five years he had been connected with purchasing of wholesale hardware [Tr. p. 127]; that for two and a half years he was assistant to the purchasing agent of the California Hardware Company; that by reason of his position he had learned from the trade the reliability and reputation of various manufacturers. [Tr. p. 128.] He further testified that the Turner, Day and Woolworth Handle Company was a responsible firm [Tr. p. 128] and had the reputation of furnishing a first-rate product. [Tr. p. 129.]

Mr. Leslie Arthur Estes testified that he was the buyer for the Southern Pacific Company and had been for fifteen years; that he supervised the purchasing of brake clubs [Tr. p. 140]; that throughout the period the Southern Pacific Company had been buying from Turner, Day and Woolworth Handle Company; that he had discussed purchasing brake clubs from other firms; that other firms had submitted prices on brake clubs which were lower than those purchased from Turner, Day and Woolworth Handle Company; that he purchased from Turner, Day and Woolworth Handle Company because of the quality of their product; that Turner, Day and Woolworth Handle Com-

pany were considered one of the leading tool manufacturers; that tools included brake clubs [Tr. pp. 140 and 141]; that in conjunction with the United States Department of Commerce he had carried on an investigation as to the kind of wood to be used in brake clubs. [Tr. p. 142.]

Mr. Robert Adam Graham, Chemist for the Southern Pacific Company, testified that upon the receipt of a shipment of clubs that the shipment was personally inspected by him and the inspection consisted of a visual inspection by inspecting one club out of every twenty, which is equal to five per cent; that such inspection is universal testing practice [Tr. pp. 129-131, incl.], and that then the clubs are brought into the laboratory and checked for their breaking strength and their deflection from the center axis by placing them in a large machine that fixes the end of the club, and the handle end is raised with a traction dynometer (is similar to a scale) and the force exerted on the club is measured; that he measured the actual breaking strength of the clubs; that the defendant required that a club should withstand a pressure of at least 500 pounds. In the event a defective club appears from the tests, he returned to the shipment and went through it very carefully because the company allowed no defects in a brake club; that he would not condemn the entire shipment if one defective brake club was found, but he would then go through another five per cent and if he found a second one defective he would go through the entire shipment [Tr. p. 132]; that he could not test every brake club in the shipment to determine its tensile strength; that when a brake club is tested it is destroyed for further use; that if a test were made on each and every club, it would destroy the entire shipment; five per cent of the clubs are selected at random and tested to determine whether or not

they will withstand pressure of 500 pounds. [Tr. p. 133.] Three pictures showing the laboratory tests were used to demonstrate the method used in testing the brake clubs. Laboratory Test No. 424-1 represents a handle set up to make the original first test. It is a new handle. This is a big Olson testing machine which is used to hold the clubs firmly in the block; there is a gauge which registers the pounds of pressure exerted upon the handle; a steel rule is used to indicate how far the center of the handle is from the floor; force is applied by means of a chain hoist with a traction dynamometer which raises the handle into the position shown in Laboratory Test No. 424-1; the hoist is then in the position to start the tests. [Tr. pp. 134 and 135.] A picture of Laboratory Test No. 424-1 was thereupon received in evidence as Defendant's Exhibit A.

Laboratory Test No. 424-2 is a closeup view of the point of application of force. It shows the end of the handle where a bolt is placed through the center so the handle will not slip in making the load application. The ruler at the end is for measuring the height from the floor. Laboratory Test No. 424-2 was thereupon received in evidence as Defendant's Exhibit B.

Laboratory Test No. 424-3 shows the club after the load has been applied but before fracture. The handle is deflected from the center line of the axis about six inches. Laboratory Test No. 424-3 was thereupon received in evidence as Defendant's Exhibit C. For the convenience of the Court there will be found in the appendix photographs of Defendant's Exhibits A—424-1, B—424-2 and C—424-3 without the marks placed upon them by the witness.

Mr. Graham examined Plaintiff's Exhibit No. 1 and stated that from the appearance of the wood on the outside that he would have passed it as a good and sufficient club, and that there was no way of discovering the defect in the club prior to the time it was broken other than by putting it in the machine and breaking it. [Tr. pp. 137 and 138.] His testimony in this significant aspect of the case stands unchallenged and undisputed.

The clubs are sent out as being safe when one out of twenty passes inspection. The other nineteen go out to be used, which is the practice universally accepted. [Tr. p. 140.]

Mr. Carson, the plaintiff, testified that when he went to work he could select a brake club from any number that were present and in the event a brake club is there, which in his opinion had been used a sufficient length of time, he had a right to take another one and that any brake club that appeared to be defective he had a right to reject, and that he would be given a new brake club. [Tr. p. 56.] That on the morning he selected the brake club in question the brake club appeared practically new and that he examined it, found no flaws or defects which were visible and that no examination as far as he was concerned revealed any defect whatsoever in the manufacture or construction of the club up until the time it broke. [Tr. p. 57.]

Mr. Wilson D. Jacobs, witness produced by the plaintiff, examined the broken brake club in the presence of the jury and stated that it was the type of brake club used on the Los Angeles Division of the Southern Pacific Company for a good many years—approximately fifteen or eighteen years [Tr. p. 79]; that he did not know what

the tensile strength of oak was; that he could not pick up a piece of wood and tell whether it was first or second growth; that he was not a wood specialist. [Tr. p. 82.] He thereupon testified, over the objection of the defendant, that by picking up a club he could tell whether or not it was strong enough to use in ordinary braking operations; that the club was too light to be of a good grade of wood to sustain the strain put on a brake club when any degree of force was applied to it. [Tr. p. 83.] When asked the weight of the club on cross-examination he stated that it would be only two and a half pounds, something like that, and that the club that he had in mind would weigh approximately a half pound or so heavier; that he did not know the specified weight of the clubs, and that there was no specified weight according to the specifications, and that upon picking up the club in his hand it was his opinion that he didn't think it was quite heavy enough. [Tr. p. 84.]

We quoted the testimony of Mr. Jacobs with reference to his opinion that the club was too light not because, in our opinion, it had any probative value as to whether or not the Southern Pacific Company had exercised reasonable care in the selection of its clubs, but only for the purpose of including all the testimony in connection with this point.

We believe the undisputed evidence shows in this case that the Southern Pacific Company bought from a reputable manufacturer, inspected the clubs, made mechanical tests, which are universally accepted as a means of determining whether or not an article is good or bad, and that when it had exhausted all the reasonable means it had at its command to test the clubs, it thereby performed its duty and obligation to its employees, and that a charge of

negligence cannot be predicated upon the mere fact that one club out of a shipment was found to be defective, and where such defect could not be discovered without destroying the usefulness of the club itself.

In the case of *Lowden, et al. v. Hanson,* 134 Fed. Rep. (2d) 348, where a brake standard purchased from a reputable manufacturing concern broke and an employee was injured, Mr. Justice Gardner, of the Eighth Circuit Court of Appeals, states the rule to be:

> "They were under the continuing duty of exercising ordinary care to see that the instrumentalities and appliances furnished for the use of plaintiff, as well as the premises where he was required to work, were maintained in a reasonably safe condition. Phillips Petroleum Co. v. Manning, 8 Cir., 81 F. 2d 849. It was, therefore, their duty to have the appliances so furnished inspected from time to time. Here it appears from the undisputed evidence that this spring switch stand was one of standard make, in general use and manufactured by a reputable manufacturer. When received and installed it was in the nature of a unit and not dismantled; there was no evidence that it was not properly installed so that in the first instance it cannot be said that the defendants failed to exercise ordinary care in supplying, furnishing and installing this equipment. Richmond & D. R. Co. v. Elliott, 149 U. S. 266, 13 S. Ct. 837, 37 L. Ed. 728; Clarkson Coal & Dock Co. v. Northern Lakes S. S. Co., 8 Cir., 251 F. 181; Jenkins v. St. Paul City R. Co., 105 Minn. 504, 117 N. W. 928, 20 L. R. A., N. S., 401. Of course, the rule could not be invoked if the appliance or equipment were patently and openly defective. But there was nothing about this finished product indicating to the naked eye

that it was at the time it was installed deficient in any particular, and no one is required to guard against that which a reasonably prudent person under the circumstances could not anticipate as likely to happen (Ft. Smith Gas Co. v. Cloud, 8 Cir., 75 F. 2d 413, 97 A. L. R. 833); the equipment having been purchased from a reputable manufacturer, we are clear that the defendants could not be charged with negligence because of any structural or inherent defect which was not patent at the time of its installation. Defendants were warranted in assuming in the absence of any notice to the contrary, that the equipment was without structural defects, and it was not incumbent upon them to dismantle the appliance and separate it into its various parts for the purpose of discovering possible defects. It was manufactured, assembled, inspected and tested by experts before it was ever placed upon the market. This was implied from the fact that the manufacturer was a reputable one. While it was the duty of defendants to inspect this appliance, it is our view that in the absence of any evidence that it was not properly functioning, defendants were not required to dismantle the appliance and submit it to a microscopic inspection or the other scientific tests suggested by one of the witnesses for the purpose of discovering possible structural defects. The functioning of the switch did not indicate any defect or break, nor did it give notice or warning of any deficiency. Under the undisputed evidence we are of the veiw that there was no negligence in failing to discover an alleged structural defect nor in failing to dismantle and subject the instrumentality to a microscopic inspection, there being no evidence of a custom of submitting such appliances to such a test. Copeland v. Chicago, B. & Q. R. Co.,

8 Cir., 293 F. 12; Canadian Northern R. Co. v. Senske, 8 Cir., 201 F. 637; Lake v. Shenango Furnace Co., 8 Cir., 160 F. 887; Waddell v. A. Guthrie & Co., 10 Cir., 45 F. 2d 977; Shankweiler v. Baltimore & O. R. Co., 6 Cir., 148 F. 195; Weireter v. Great Northern R. Co., 146 Minn. 350, 178 N. W. 877; Cederberg v. Minneapolis, St. P. & S. S. N. R. Co., 101 Minn. 100, 111 N. W. 953; McGivern, etc., v. Northern Pacific R. Co., 8 Cir., 132 F. 2d 213, 218. In McGivern v. Northern Pacific R. Co., *supra,* we said: 'These instrumentalities were in general use and met with general approval for the performance of this work. Two other carriers doing switching in Minnesota were shown to follow exactly the same practice. While custom or usage may not be controlling as fixing the standard of care it may be accepted where the custom or practice is not in itself negligent or in disregard of the safety of the employee.' In Canadian Northern R. Co. v. Senske, *supra,* the late Judge Walter H. Sanborn, speaking for this court, among other things said [201 F. 643]: 'The degree of care commonly exercised by other persons engaged in the same kind of business under similar circumstances presents such a standard. * * * the best test of actionable negligence and the true standard for the measurement of ordinary care is the degree of care which persons of ordinary intelligence and prudence, engaged in the same kind of business, commonly exercise under like circumstances. If the care exercised in the case rises to or above that standard, there is no actionable negligence.'

The evidence was to the effect that it was not the custom in inspecting appliances of this sort to dismantle them or subject them to microscopic examination. In the absence of any apparent defect or of

any failure to function there was nothing to suggest the necessity or propriety of dismantling this apparatus for the purpose of microscopic inspection. Certain instructions were issued by the manufacturer with reference to inspections. These contained no suggestion that a dismantling of the apparatus should be necessary in making inspection. The only reference to a general inspection found in the instructions reads as follows: 'The switch stand should be inspected frequently and it is recommended that the signal department and the track department make a joint inspection occasionally.' The evidence shows that this instruction was complied with by the defendants."

The affirmation of the judgment in favor of the plaintiff in *Lowden v. Hanson, supra,* was based upon the premise that the evidence showed that there was a simple test which the defendant could have made and discovered the defect in the instrumentality, but that that test was never made.

In this case there is no evidence or even a suggestion that the defendant failed to use all reasonable, available tests to detect defects in the clubs. There was nothing about the finished product indicating to the naked eye that the club was weak or otherwise defective.

The alleged weakness of the club would have been discovered by breaking and destroying it with resulting destruction of all of its usefulness. The law does not require such destruction.

The plaintiff's admission that he personally selected the club out of an open bin containing many other clubs, and that after he had examined it and found it to be a prac-

tically new and satisfactory club with no visible defects, is cogent evidence that the club had been previously and properly inspected by the defendant. The defendant's eyes could be no better than those of the plaintiff in so far as visible inspection was concerned.

The plaintiff, for all practical purposes, although not realizing that he was doing so, tested the strength and the quality of the club on approximately thirty different occasions [Tr. p. 58] shortly prior to the accident by using it to set up and tie down brakes. These tests, made by the plaintiff, disclosed no weakness or defect in the club. It is impossible to conceive of any other more searching or appropriate test of the club which could or should have been made by the defendant.

Conclusion.

It is respectfully submitted that in the respects above assigned, the trial court committed prejudicial error, and that the judgment should be set aside and reversed.

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APPENDIX.

United States Safety-Appliance Standards Order of Commission of March 13, 1911.

It Is Ordered, That the number, dimensions, location, and manner of application of the appliances provided for by section two of the Act of April 14, 1910, and section four of the Act of March 2, 1893, shall be as follows:

HAND BRAKES: Number—Each box or other house car shall be equipped with an efficient hand brake which shall operate in harmony with the power brake thereon. The hand brake may be of any efficient design, but must provide the same degree of safety as the design shown on Plate A.

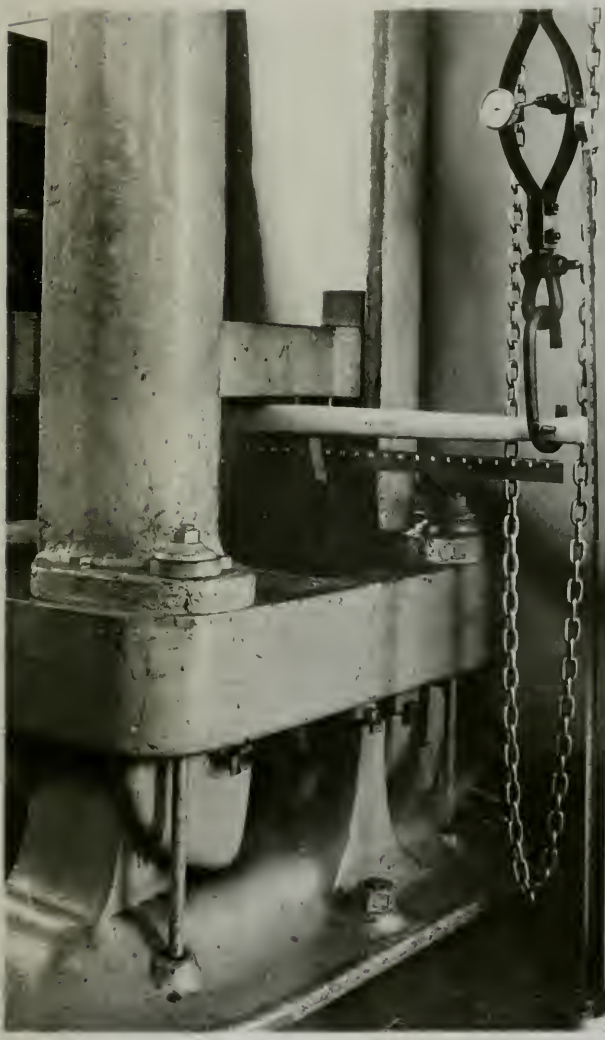
Dimensions—The brake shaft shall be not less than one and one-fourth (1 1/4) inches in diameter, of wrought iron or steel without weld. The brake wheel may be flat or dished, not less than fifteen (15), preferably (16), inches in diameter, of malleable iron, wrought iron or steel.

Location—The hand brake shall be so located that it can be safely operated while car is in motion. The brake shaft shall be located on end of car, to the left of and not less than seventeen (17) nor more than twenty-two (22) inches from center.

Manner of Application—There shall be not less than four (4) inches clearance around rim of brake wheel. Outside edge of brake wheel shall be not less than four (4) inches from a vertical plane parallel with end of car and passing through the inside face of knuckle when closed with coupler horn against the

buffer block or end sill. Top brake shaft support shall be fastened with not less than one-half (1/2) inch bolts or rivets. (See Plate A.) A brake shaft step shall support the lower end of brake shaft. A brake shaft step which will permit the brake chain to drop under the brake shaft shall not be used. U-shaped form of brake shaft step is preferred. (See Plate A.) Brake shaft shall be arranged with a square fit at its upper end to secure the hand brake wheel; said square fit shall be not less than seven-eighths (7/8) of an inch square. Square fit taper; nominally two (2) in twelve (12) inches. (See Plate A.) Brake chain shall be of not less than three-eighths (3/8), preferably seven-sixteenths (7/16) inch, wrought iron or steel, with a link on the brake rod end of not less than seven-sixteenths (7/16), preferably one-half (1/2), inches wrought iron or steel, and shall be secured to brake shaft drum by not less than one-half (1/2) inch hexagon or square headed bolt. Nut on said bolt shall be secured by riveting end of bolt over nut. (See Plate A.) Lower end of brake shaft shall be provided with a trunnion of not less than three-fourths (3/4), preferably one (1), inch in diameter extending through brake shaft step and held in operating position by a suitable cotter or ring. (See Plate A.) Brake shaft drum shall be not less than one and one-half (1 1/2) inches in diameter. (See Plate A.) Brake ratchet wheel shall be secured to brake shaft by a key or square fit, said square fit shall be not less than one and five-sixteenths (1 5/16) inches square. When ratchet wheel with square fit is used provision shall be made to prevent ratchet-wheel from rising on shaft to disengage brake pawl. (See Plate A.)

Brake ratchet-wheel shall be not less than five and one-fourth (5 1/4), preferably five and one-half (5 1/2), inches in diameter and shall have not less than fourteen (14), preferably sixteen (16), teeth. (See Plate A.) If brake ratchet-wheel is more than thirty-six (36) inches from brake wheel, a brake shaft support shall be provided to support this extended upper portion of brake shaft; said brake shaft support shall be fastened with not less than one-half (1/2) inch bolts or rivets. The brake pawl shall be pivoted upon a bolt or rivet not less than five-eighths (5/8) of an inch in diameter, or upon a trunnion secured by not less than one-half (1/2) inch bolt or rivet, and there shall be a rigid metal connection between brake shaft and pivot of pawl. Brake wheel shall be held in position on brake shaft by a nut on a treaded extended end of brake shaft; said threaded portion shall be not less than three-fourths (3/4) of an inch in diameter; said nut shall be secured by riveting over or by the use of a lock nut or suitable cotter. Brake wheel shall be arranged with a square fit for brake shaft in hub of said wheel; taper of said fit, nominally two (2) in twelve (12) inches.



Neb. No. 424-1
Traction Dynamo
Start of test.
Ready to be app

424-1

Lab. No. 424-2
Close up. Meth
applying load
club.
424-P

Lab. [illegible] [illegible]
[illegible] partially
to br[illegible] Lab.